S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

JANET HANSEN, Personal Representative of the ESTATE OF JACK HANSEN, Plaintiff-Appellant, v STATE FARM FIRE & CASUALTY COMPANY, Defendant-Appellee.	UNPUBLISHED May 9, 2006 No. 258054 Kent Circuit Court LC No. 04-005745-CP

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiff, as personal representative of the Estate of Jack Hansen, appeals as of right from the trial court's order denying her motion for summary disposition and granting summary disposition in favor of defendant. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The facts giving rise to this case are as follows. In 1996, plaintiff and Jack Hansen, then husband and wife, purchased an umbrella insurance policy from one of defendant's agents, Dennis Leach. The policy, which provided coverage in addition to that provided by the Hansen's existing homeowner's and automobile policies, contained an intra-family exclusion not present in the underlying automobile insurance policy. On March 7, 2000, plaintiff's daughter, Holly Williams, crashed a car owned by Jack Hansen and insured by defendant. The car's passenger, Holly's sister Laura Beth Williams, died as a result of the accident. Laura Beth's estate filed suit and obtained a $300,000 judgment against Jack Hansen and Holly Williams. Defendant then filed a suit against the Hansens in the Montcalm Circuit Court and obtained a declaratory judgment holding that, due to the intra-family exclusion, the umbrella policy did not cover the judgment obtained by Laura Beth's estate. In response, plaintiff filed the instant suit in the Kent Circuit Court, alleging that Leach misrepresented the extent of the coverage under the umbrella policy by failing to disclose the intra-family exclusion and seeking damages under the Michigan Consumer Protection Act (MCPA).[1] Plaintiff moved for summary disposition based on collateral estoppel, asserting that, at the bench trial in the earlier litigation, the presiding

[1] MCL 445.901 *et seq*.

judge, David A. Hoort, held that Leach had in fact misrepresented the terms of the policy. The trial court took a different view of Judge Hoort's ruling and granted summary disposition in favor of defendant.

The decision to grant or deny summary disposition presents a question of law that this Court reviews de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Similarly, whether collateral estoppel bars a claim constitutes a question of law subject to de novo review. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004).

The trial court initially considered plaintiff's motion under MCR 2.116(C)(10) and ultimately granted summary disposition in favor of defendant pursuant to under MCR 2.116(I). Summary disposition is appropriate under MCR 2.116(C)(10) where "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When ruling on motions brought under MCR 2.116(C)(10), courts must consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Further, "[if] it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2); *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

However, MCR 2.116(C)(7), rather than (C)(10), provides the proper basis for granting summary disposition pursuant to the doctrine of collateral estoppel. *Alcona Co v Wolverine Environmental Production*, Inc, 233 Mich App 238, 246; 590 NW2d 586 (1998). Despite the fact that it considered the motion under the wrong subrule, the trial court's error was harmless. When deciding on a motion under MCR 2.116(C)(7), as with motions brought pursuant to subsection (C)(10), courts consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party. *Id.* Further, where a trial court grants summary disposition based on the wrong subrule, Michigan appellate courts will review the order under the correct rule. *Speik v Dep't of Transportation*, 456 Mich 331, 338, n 9; 572 NW2d 201 (1998). Consequently, we review the trial court's decision under MCR 2.116(C)(7).

Collateral estoppel precludes relitigation of issues between the same parties. *VanVorous*, *supra*, 479-480, citing *Jones v Chambers*, 353 Mich 674, 680-681; 91 NW2d 889 (1958). In *Monat v State Farm Ins Co*, 469 Mich 679, 682-685; 677 NW2d 843 (2004), our Supreme Court stated that a party seeking application of this doctrine must establish that: (1) a question of fact was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there is mutuality of estoppel, i.e., the party seeking to take advantage of the prior adjudication would have been bound by it if it had resulted in an adverse disposition.

In the earlier litigation, Judge Hoort noted that the parties did not dispute that the umbrella policy in question contained an intra-family exclusion that, if it applied, would exclude coverage. But among the issues being litigated was the Hansens' claim that defendant's agents

misrepresented the terms of the policy. After finding that the Hansens were told that the umbrella policy extended the coverage available under their other insurance policies, Judge Hoort stated:

> As such, the statement made by them was not due or because of any type of fiduciary relationship between the insurer and the insured. Again, unfortunately it was a statement that was made, that was made without knowledge of what the policy was and was unfortunately wrong. That statement, whether one call it a misrepresentation or an innocent misrepresentation or puffing or anything else is not something such as that would allow for liability under the umbrella policy here. Maybe it would be something as such that would allow the parties to break the contract or get some type of refund, but it is not something that would require enforcement or coverage of the umbrella policy in this case.

Plaintiff asserts that this statement establishes that Judge Hoort found that Leach misrepresented the terms of the umbrella policy. Plaintiff also contends that, although he found the intra-family exclusion enforceable, the judge's statement invited the Hansens to seek other relief and prompted plaintiff to file suit under the MCPA.

However, following the above statement, Judge Hoort went on to state:

> It is close but because there was never even any thought so far as any family exclusion, I'm not willing to say that the representations by Mr. Leach were something as such that indicated that the coverage would be identical. I don't think that would be a reasonable interpretation of his representation. There are with that many minute differences in every policy, especially when you are a cross-coverage policy between auto owners, home owners or otherwise. . . .[T Tr, 13-14.]

Judge Hoort explicitly found that defendant's agent did not tell the Hansens that the extent of their coverage under the umbrella policy would be identical to that under their underlying policies. Rather than enforcing the exclusion despite a misrepresentation, Judge Hoort held that Leach did not make the alleged misrepresentation.

Based on Judge Hoort's findings, the trial court in the instant case correctly applied the doctrine of collateral estoppel and granted summary disposition in favor of defendant. A question of fact regarding whether Leach misrepresented the extent of the coverage under the umbrella policy was actually litigated and determined in the earlier action for declaratory judgment. Because both parties assert that collateral estoppel requires judgment in their favor, they must necessarily agree that they had a full and fair opportunity to argue the issue before Judge Hoort. Finally, if Judge Hoort had found that a misrepresentation had occurred, defendant would be bound by that judgment. Because each of the requirements set forth in *Monat, supra*, 682-685, have been satisfied, we find that plaintiff is estopped from asserting that defendant's agent misrepresented the terms of the umbrella policy. And because plaintiff premised her claims on the existence of such misrepresentations, her action for damages under the MPCA must fail. Consequently, we affirm the trial court's order denying plaintiff's motion for summary disposition and granting summary disposition in favor of defendant.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio